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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 274

POMPEY MARXHAUSEN FREDERICK,
in his individual capacity and by John L. King, next friend,
Petitioner,
vs.
FIRST LIQUIDATING CORPORATION,
a Michigan Corporation,
MERCHANTS APPAREL BUILDING, INC.,
a Michigan Corporation,
MASSACHUETTS MUTUAL LIFE INSURANCE COMPANY, a Foreign Corporation,
ROCHESTER APARTMENTS COMPANY,
a Michigan Corporation,
LOUIS H. and GOLDIE SCHOSTAK, his wife,
EVA WIDGODSKI and JEANNE H. GREENBAUM,
jointly and severally,
Defendants

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

A writ of certiorari, directed to the Michigan Supreme Court, is sought by the petitioner herein on the ground that he was denied a trial by jury in a state court ejectment suit (pp. 4, 12, 13 of petition). This claimed denial of jury trial resulted from an order of the circuit court for the County of Wayne (77-102), affirmed by the Su-

preme Court of the State of Michigan, granting defendants' motions to dismiss. The latter motions were predicated on former adjudications, and a settlement agreement to which petitioner through his former guardian was a party, as well as the failure of the plaintiff to allege a cause of action. Said motions were heard and granted pursuant to the provisions of Michigan Court rules authorizing such procedure where no material issue of fact is framed requiring a trial by jury.

The decision of the Michigan Supreme Court here complained of was filed on April 17, 1947 (appellant's petition for rehearing being denied on May 16, 1947), *Frederick v. First Liquidating Corporation*, 317 Mich. 637, 27 N. W. 2d 117. Respondents were served with copies of the printed petition for certiorari herein on August 8, 1947, and with notice of the filing thereof on August 21, 1947.

Examination of the record in this cause will readily disclose not only the absence of any basis for federal jurisdiction or review by this Court, but also the utter absence of any meritorious cause of action in the petitioner's ejectment proceedings in the state court. As the petition, however, does not set forth the facts of the case, we include herein the following statement of case.

STATEMENT OF CASE

Petitioner's suit in ejectment was based upon his claim to an undivided interest in real estate in the City of Detroit, Michigan, by virtue of a devise in the will of his grandfather, August Marxhausen. The latter died in 1920 ~~1924~~, and his estate was administered by the probate court for the County of Wayne. Petitioner Pompey Marxhausen Frederick, at that time a minor, was represented during the administration of said probate estate by his father, Christian Frederick, who was the duly appointed and qualified guardian of petitioner (24, 25).

In the course of the administration of the probate estate, it became necessary for the executor to borrow money for the payment of debts and expenses of administration. A petition for license to mortgage the real estate here in question was filed (49), duly published and noticed for hearing, and heard and granted by the probate court in December of 1926 (54, 55). The money was borrowed from the Dime Savings Bank of Detroit, a mortgage therefor being executed by the executor in accordance with the order of the Court, the report of the mortgage, together with statutory bond being duly filed with, and an order of confirmation being entered therein by, the Probate Court in January of 1927 (56-58).

Not only were the foregoing proceedings entirely regular, as pointed out by the Michigan Supreme Court, but the respective orders authorizing and confirming the mortgage as executed were never appealed from or set aside and have at all times remained in full force and effect (37).

Disputes arose between petitioner's guardian and other heirs of the estate, as well as with the executor, which

were resolved by an agreement of settlement, compromise and release entered into by the parties in interest in 1928 (59). The agreement was executed only after the parties, including petitioner through his said guardian, petitioned for and obtained authority from the Probate Court to enter into and consummate such settlement agreement (64, 66). In addition to the other issues settled thereby, said compromise agreement contained an express provision whereby the parties including petitioner, recognized the lien of the mortgage above referred to (59).

Upon consummation of said compromise the accounts of the executor were filed and allowed, the estate distributed, the executor discharged and the estate closed (38, 39, 68). Petitioner, through his guardian, received and retained his distributive share thereof (26, 27).

Thereafter, petitioner's guardian dismissed the counsel who had represented him up to that point, retained new counsel (consisting of present counsel for petitioner and an associate) and petitioned the probate court to set aside said compromise agreement and the subsequent proceedings taken on the strength thereof. This petition was heard by the probate judge and denied. The ruling was reviewed by petitioner's guardian by certiorari to the Circuit Court for the County of Wayne, whose ruling in turn was reviewed by writ of error sued out in the Supreme Court of Michigan. In both reviewing courts, the allegations made on behalf of petitioner were held without merit, and the rulings of the Probate Court were upheld (*In re Marxhausen's Estate,* 247 Mich. 192, 225 N. W. 632).

The mortgage in question eventually fell in default, and in 1937 was foreclosed (69). No redemption was had, and upon the foreclosure becoming absolute possession of the premises was obtained by the mortgagee (28). Present

defendants and respondents include subsequent innocent purchasers and mortgagee of the premises (28, 29).

In 1945, petitioner Pompey M. Frederick became of age (4), and in 1946, said suit in ejectment was instituted in his name by the same counsel who had unsuccessfully attacked the settlement agreement and proceedings as above described. Defendants moved to dismiss for the reasons already noted (14, 15, 19). After hearing and argument, and consideration of the briefs which were filed by all parties, the Court held the motions well founded and dismissed the suit. Upon appeal therefrom by the plaintiff, this ruling was sustained by the unanimous decision of the Michigan Supreme Court.

Because of the latter decisions, petitioner now seeks a writ of certiorari directed to the Michigan Supreme Court claiming unlawful deprival of the right to trial by jury.

ARGUMENT

A. STATE COURT RULES OF PRACTICE AND PROCEDURE, PERMITTING SUMMARY DISPOSITION OF CAUSES UPON MOTION WHERE NO ISSUE OF FACT EXISTS FOR DETERMINATION BY JURY, IN NO WAY INFRINGES UPON ANY CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

B. NO FEDERAL QUESTION EXISTS, JUSTIFYING REVIEW OF THE DECISIONS OF THE STATE SUPREME COURT BY THIS COURT, BECAUSE OF DETERMINATION OF CIVIL ACTION UPON MOTION RATHER THAN BY JURY TRIAL UNDER STATE RULES OF PRACTICE AND PROCEDURE AUTHORIZING SUCH DISPOSITION IN ABSENCE OF ISSUE OF FACT REQUIRING JURY DETERMINATION.

Much of the practice and procedure in Michigan Courts is regulated by the court rules formulated by the Michigan Supreme Court. Rules 17 and 18 thereof, so far as material here provide as follows (Italics ours):

> "Rule 17.
>
> "Section 1. All pleadings must contain a plain and concise statement without repetition of the facts on which the pleader relies in stating his cause of action or defense, and no others. * * *
>
> "Sec. 7. Demurrers are abolished, and whenever any pleading at law or in equity is deemed to be insufficient in substance, a motion to dismiss or to strike or for judgment on the pleading may be made, * * *.
>
> "Rule 18.
>
> "Section 1. Defendant may, within the time for pleading, file a motion to dismiss the action or suit, where any of the following defects appear on the

face of the declaration or bill of complaint, and he may, within the same time, file a similar motion *supported by affidavits* where any of the said following defects do *not* appear upon the face of the declaration or bill of complaint:

• • •

"(e) That the cause of action is barred by a prior judgment.

• • •

"(g) That the claim or demand set forth in the plaintiff's pleading has been released. • • •

"Sec. 3. If, upon the hearing of such motion, the opposite party shall present affidavits or other proof denying the facts alleged or establishing facts obviating the objection, the court may take proof, and hear and determine the same and may grant or deny the motion; but if disputed questions of fact are involved the court may deny the motion without prejudice and *shall so deny it if the action is one at law and the opposite party demands that the issue be submitted to a jury.*"

As is plainly evident from the foregoing, full opportunity is granted by the court rule to create or define issues of fact, if any actually exist, and in that event the right to trial by jury is expressly reserved and protected.

This rule-making power of the Michigan Supreme Court is supported by both constitutional and legislative enactments. Thus, Article VII, section 5 of the Michigan Constitution of 1908 states:

"Sec. 5. The supreme court shall by general rules establish, modify and amend the practice in such court and in all other courts of record, and simplify the same. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings."

And Michigan Statutes Annotated, section 27.34, likewise provides:

> "(27.34) Same; rules of practice in courts of record, improvements. Sec. 14. The justices of the supreme court shall have power, and it shall be their duty, by general rules to establish, and from time to time thereafter to modify and amend, the practice in such court, and in all other courts of record, in the cases not provided for by any statute; and they shall, once at least in every two (2) years thereafter, if necessary, revise the said rules, with the view to the attainment, so far as may be practicable, of the following improvements in the practice:
>
> 1. The abolishing of distinctions between law and equity proceedings, as far as practicable;
>
> 2. The abolishing of all fictions and unnecessary process and proceedings;
>
> 3. The simplifying and abbreviating of the pleadings and proceedings;
>
> 4. The expediting of the decisions of causes;
>
> 5. The regulation of costs;
>
> 6. The remedying of such abuses and imperfections as may be found to exist in the practice;
>
> 7. The abolishing of all unnecessary forms and technicalities in pleading and practice;
>
> * * *"

In the present case all of the material facts were evidenced by incontrovertible (and uncontroverted) public records, consisting of recorded instruments and the judicial files and proceedings of courts of record. Pursuant to the court rules above cited, defendants moved to dismiss, their motions being supported by affidavits which incorporated the relevant records (17, 20, 21-29). Petitioner

denied none of the facts set forth by the defendants, and filed no affidavit in opposition to the motion as permitted by the court rule. Accordingly no issue of fact was presented (nor could one have been, in all honesty). The cause was submitted on briefs in which the various legal theories asserted by petitioner were argued.

An examination of the opinion of the Wayne circuit court will reveal the painstaking care and consideration which the circuit judge gave to the numerous (and frequently curious) legal theories advanced by the petitioner (77-101). The court concluded that the motions to dismiss were well founded, a conclusion which found unanimous affirmance in the Michigan Supreme Court.

Petitioner complains, in his petition to this Court, that he has been deprived of a jury trial, therefore has not had "his day in court," and consequently has been "deprived of property without due process of law." Quite obviously, however, a jury trial is not an end in and of itself, but merely a method provided by law for determining issues of fact where there are such relevant issues of fact requiring determination.

Just as a court may direct a verdict upon trial by jury, where the evidence is insufficient to go to a jury, it may also provide by rule for summary disposition of cases in which no material issue of fact exists. Certainly, there is no denial of due process, nor of a day in Court, in the setting up of judicial procedures for winnowing out and speedily disposing of cases which involve no issue of fact, or in which the cause of action or defense can be shown to be without merit as a matter of law.

> *Fidelity & Deposit Co. v. United States of America to the use of Smoot,* 187 U. S. 315, 47 L. ed. 194, at pages 197 and 198;

Robertson v. New York Life Insurance Co., 312 Mich. 92, 19 N. W. 2d 498; cert. den. 326 U. S. 786, 90 L. ed. 477, 66 Sup. Ct. 470; rehearing den. 327 U. S. 88, 66 Sup. Ct. 896;

Kaiser v. North, 292 Mich. 49, 289 N. W. 325;

Peoples Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N. W. 170 (69 A. L. R. 1024).

As stated in the Kaiser case, *supra*, at page 55:

> "And the matter of appellants being deprived of a right to trial by jury is obviously of no consequence except it is first established that they have a cause of action to be tried. In *Peoples Wayne County Bank v. Wolverine Box Company*, 250 Mich. 273 (69 A. L. R. 1024), we said 'if there are not issues of fact to be determined, one is not entitled in a civil case to trial by jury. *In re: Peterson*, 253 U. S. 300 (40 Sup. Ct. 543).'"

Moreover, the propriety of trial by jury in such State Court civil proceedings involves no federal question, authorizing review by this Court of the decision of the Supreme Court of the State of Michigan. As this Court has had frequent occasion to point out, the Federal Constitution does not regulate state court judicial procedure or make obligatory a trial by jury therein. Among the many applicable decisions on this point are:

Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678;

Southern R. Co. v. Durham, 266 U. S. 178, 69 L. ed. 231;

Chicago, R. I. & Pr. Co. v. Cole, 251 U. S. 54, 64 L. ed. 133, at pg. 135;

Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, L. R. A. 1917A, 86.

As was said in the Walker case, *supra:*

"So far as we can discover from the record, the only federal question decided by either one of the courts below was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the Act of 1871 to the contrary. He insisted that he had a constitutional right to such a trial, and that the statute was void to the extent that it deprived him of this right.

"All questions arising under the Constitution of the State alone are finally settled by the judgment below. We can consider only such as grow out of the Constitution of the United States. By Article VII of the Amendments, it is provided, that 'In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliott,* 21 Wall. 557, 22 L. ed. 492. The States, so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State Courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. *Murray v. Hoboken L. & I. Co.,* 18 How. 280, 15 L. ed. 376. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under

> the authority of the United States. Art. VI Const. Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States."

As stated in the Southern Railway Company case, *supra:*

> "Neither Federal laws nor Constitution gave them the right to demand trial by jury when the local statutes and practice prescribed otherwise. The ordinary rule applies, and we accept the ruling of the supreme court as to the local law. *First Nat. Bank v. Weld County,* 264 U. S. 450, 454, 68 L. ed. 784, 787, 44 Sup. Ct. Rep. 385."

To like effect is the language of Mr. Justice Holmes in the Chicago etc. Railway Company case, *supra:*

> "There is nothing, however, in the Constitution of the United States or its Amendments, that requires a state to maintain the line with which we are familiar between the functions of the jury and those of the court. It may do away with the jury altogether (*Walker v. Sauvinet,* 92 U. S. 90, 23 L. ed. 678), modify its constitution (*Maxwell v. Dow,* 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494), the requirements of a verdict (*Minneapolis & St. L. R. Co. v. Bombolis,* 241 U. S. 211, 60 L. ed. 961, L. R. A. 1917A, 86, 36 Sup. Ct. Rep. 595, Ann. Cas. 1916E, 505), or the procedure before it (*Twining v. New Jersey,* 211 U. S. 78, 111, 53 L. ed. 97, 111, 29 Sup. Ct. Rep. 14; *Frank v. Mangum,* 237 U. S. 309, 340, 59 L. ed. 969, 985, 35 Sup. Ct. Rep. 582)."

The record below amply discloses that petitioner was given every opportunity to develop all theories of fact and of law occurring to him in support of his alleged cause of action. It is further quite apparent from the record,

however, that this cause is utterly devoid of any semblance of a meritorious cause of action. Every theory urged by petitioner below was heard and considered on its merits by the State circuit and supreme courts, and found by both courts to be without merit. Certainly, no basis whatever is shown or exists herein for review by this Court of the decision of the Michigan Supreme Court.

Respectfully submitted,

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